

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

MARK THOMAS GRUNAU,

Defendant and Appellant.

H015871

(Santa Clara County

Super. Ct. No. 185613)

I. STATEMENT OF THE CASE

A jury convicted defendant Mark Thomas Grunau of annoying a child under the age of 18 and loitering on school grounds, and defendant admitted having two strike prior convictions. (Pen. Code, §§ 647.6, 653, subd. (g), 667, subds. (b)-(i), 1170.12.)¹ On appeal from the judgment, he claims there was insufficient evidence to support a conviction for annoying a child. He also claims the court erred in admitting evidence of prior sexual misconduct.

We affirm the judgment.

II. THE EVIDENCE

After school on November 1, 1995, a high school girls swim team held a practice. During practice, 16-year-old L. and others noticed that defendant was

¹ All unspecified statutory references are to the Penal Code.

watching them from the entrance to the boys' locker room, which opened to the pool area. He was partially hidden by shadows and a wall. He immediately moved out of sight. The girls told their coach, Steven Howard, that someone was peeking or leering at them, and he went over to check. He did not see anyone outside, but when he entered the locker room, he saw defendant leaving. Mr. Howard returned to practice.

After practice, L. and the other girls left the pool and headed to the locker room to shower and change. At that time, L. saw a man looking at them through gaps in plywood that covered a chain-link fence surrounding the pool area. When she and others stopped to look, the man left. Some of the girls reported this to Mr. Howard.

Inside the girls locker room, 14-year-old D. showered in her swimsuit. As she rinsed her hair, she noticed that the exit-only door to the outside was open. Then she saw defendant standing in the doorway. He made eye contact with her, stared for about five seconds, closed the door, and left.

Meanwhile, Mr. Howard was outside in his car, parked where he could watch the girls as they left, make sure they were safe, and see if anyone needed a ride. While waiting, he saw defendant come out of an alcove near the exit door and walk in the shadows along the fence that borders the pool. Mr. Howard became suspicious. He stopped defendant and asked what he had been doing. He did not recognize defendant as the person he had seen leaving the locker room. Defendant said he was in the alcove area to get out of the wind. Mr. Howard did not believe him because it was not windy that evening. Defendant also said he had been at the school to use the track facilities, which were 50 yards from the locker rooms. However, Mr. Howard noticed that defendant was not wearing jogging clothes and did not appear to have been exercising. Rather, he seemed nervous. Mr. Howard asked for some identification and wrote down defendant's name and driver's license information. When he got home, he called the police and reported the incident.

Later, Detective Dennis Graham of the Milpitas Police Department spoke to defendant. Defendant said that on his way home from work that afternoon, he felt sick to his stomach and had an immediate and pressing need to use the bathroom. Although there were gas stations and fast food restaurants along the way where he could have stopped, he decided to go to the high school, which is not on the main road. Defendant explained that it did not occur to him that there were bathrooms in the restaurants, and he did not think the bathrooms at gas stations were open to the public. He drove to the high school because he had been there once in the 1970's to see a volleyball game and had used the bathroom.

Defendant further explained that that day, he used the bathroom in the boys' locker room. Thinking he might need to use it again, he stayed at the school for the next 45 minutes. During that time, he watched the girls' swimming practice from outside the boys' locker room, walked around the track, and looked through the fence to watch the girls practice. Around this time, he felt the urge to use the bathroom again. There was an unmarked door to what he thought was the boys' locker room. It had no door knob, but he was able to pull it open using the window frame. He immediately saw a girl taking a shower. Realizing his mistake, he shut the door and left. Defendant said he did not return to the parking lot because he panicked, having previously gotten into trouble for a similar incident in which he had gone into a girls' bathroom.²

Prior Offenses

In 1977, a teacher's assistant at an elementary school observed defendant follow a five-year-old girl into the bathroom. The teacher went in to investigate. Defendant and the girl were in a stall with the door closed. Defendant's pants and underwear were down

² Defendant was charged with two counts of annoying or molesting a child. Count 1 was based on watching D. shower; count 2 was based on watching L. at the pool. The jury found defendant guilty of count 1 but acquitted him of count 2, convicting him instead of the lesser included offense of loitering on school grounds.

to his ankles. He told the girl to be quiet. The teacher opened the door and asked what defendant was doing. Defendant tried to cover her mouth with his hand. First he said that he was a policeman; then he said he was the girl's brother.

In 1984, a 10-year-old girl was riding her bike home one afternoon. Defendant was driving by. He pulled over, blocked her way, and threw her into some nearby bushes. There, he reached under her skirt and touched her crotch area. He then picked her up and put her into his car. As he entered the driver's side, she escaped through a window and ran down the street. Defendant chased after her until she met up with two men, who were working outside.

III. SUFFICIENCY OF THE EVIDENCE

Defendant contends there was insufficient evidence to support his conviction for annoying or molesting a child, which was based on seeing D. in the locker room.

When considering a challenge to the sufficiency of the evidence to support a criminal conviction or enhancement, we determine whether there is substantial evidence—i.e., evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could make the necessary findings beyond a reasonable doubt. In making that determination, we do not reweigh the evidence, resolve conflicts in the evidence, or reevaluate the credibility of witnesses. Rather, we review the whole record in the light most favorable to the judgment, we draw all reasonable inferences in support of it, and we presume the existence of every fact the trier of fact could reasonably deduce from the evidence. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319-320; *People v. Johnson* (1980) 26 Cal.3d 557, 578; *People v. Vy* (2004) 122 Cal.App.4th 1209, 1224.)

Section 647.6 prohibits conduct that “annoys or molests” any child under 18 years of age. (§ 647.6, subd. (a).) The words “annoy and molest” in section 647.6 “are synonymous and generally refer to conduct designed to disturb, irritate, offend, injure, or at least tend to injure, another person.” (*People v. Lopez* (1998) 19 Cal.4th 282, 289.) The statute “does not require a touching [citation] but does require (1) conduct a

‘ “normal person would unhesitatingly be irritated by” ’ [citations] and (2) conduct
‘ “motivated by an unnatural or abnormal sexual interest” ’ in the victim [citations].”
(*Ibid.*) “[T]o determine whether the defendant’s conduct would unhesitatingly irritate or
disturb a normal person, we employ an *objective* test not dependent on whether the child
was in fact irritated or disturbed.” (*Id.* at p. 290, italics in *Lopez.*)

As examples of conduct deemed unlawfully annoying, defendant cites cases in
which the defendant fondled a child and/or had the child touch him. (*People v. Kongs*
(1994) 30 Cal.App.4th 1741; *People v. Monroe* (1985) 168 Cal.App.3d 1205; *People v.*
Moore (1955) 137 Cal.App.2d 197.) He also cites cases where the defendant exposed
himself to a child in a public place (*People v. McNair* (1955) 130 Cal.App.2d 696, 697-
698); gave a child a ride but would not the child leave the car (*In re Sheridan* (1964) 230
Cal.App.2d 365, 370-371); and followed a child riding her bicycle and made offensive
gestures (*People v. Thompson* (1988) 206 Cal.App.3d 459, 461-462).

Defendant claims that his conduct was not comparable to the conduct in these
cases and argues that “[b]riefly viewing a teenager showering in a full swim suit is not
conduct which would cause the average person to be unhesitatingly irritated or offended,
and essential element of the crime.” We disagree.

In *People v. Kongs, supra*, 30 Cal.App.4th 1741, the court explained, “The
deciding factor for purposes of a Penal Code section 647.6 charge is that the defendant
has engaged in offensive or annoying sexually motivated *conduct which invades a child’s*
privacy and security, conduct which the government has a substantial interest in
preventing and which is unrelated to the suppression of free expression.” (*Id.* at p. 1752,
italics added.)

Here, defendant blithely ignores an important fact: where his conduct took place.
D. was not simply rinsing off under an outdoor shower at a public pool. She was on a
high school campus, out of general public view, and inside a girls’ locker room, a place
that by definition is to be used exclusively by girls and where males are not allowed.

Unquestionably, a girls' locker room is a place where a normal female should, and would, reasonably expect privacy, especially when she is performing quintessentially personal activities like undressing, changing clothes, and bathing. Under the circumstances, jurors reasonably could find that a normal female who was showering in a girls' locker room would unhesitatingly be shocked, irritated, and disturbed to see a man gazing at her, no matter how briefly he did so. Accordingly, we conclude that the verdict is supported by substantial evidence.

IV. ADMISSION OF PRIOR CONVICTIONS

Prior to trial, the court ruled that evidence concerning the 1977 and 1984 incidents was admissible to prove motive and intent—i.e., that defendant's conduct was “ ‘ ‘motivated by an unnatural or abnormal sexual interest” ’ in the victim [citations].” (*People v. Lopez, supra*, 19 Cal.4th at p. 289.) However, the court excluded evidence of uncharged sexual misconduct in 1980, finding it more prejudicial than probative.³

Defendant contends the court abused its discretion in admitting the evidence.

Evidence Code Section 1101, subdivision (b), allows the introduction of evidence of uncharged misconduct when it is relevant to establish a material fact other than the person's bad character or criminal disposition such as motive and intent. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 393.) The reasoning behind the use of prior acts as circumstantial evidence of a later intent derives from “ ‘the doctrine of chances—the instinctive recognition of that logical process which eliminates the element of innocent intent by multiplying instances of the same result until it is perceived that this element cannot explain them all. . . . [A]n unusual and abnormal element might perhaps be present in one instance, but . . . the oftener similar instances occur with similar results, the less likely is the abnormal element likely to be the true explanation of them.

³ Defendant declined an offer to stipulate that the charged conduct was motivated by an unnatural and abnormal sexual interest in the victim, which would have obviated the need to introduce the prior misconduct.

[¶] . . . In short, similar results do not usually occur through abnormal causes; and the recurrence of a similar result (here in the shape of an unlawful act) tends (increasingly with each instance) to negative accident or inadvertence or self-defense or good faith or other innocent mental state, and tends to establish (provisionally, at least, though not certainly) the presence of the normal, i.e., criminal, intent accompanying such an act’ ” (*People v. Robbins* (1988) 45 Cal.3d 867, 879-880, superseded by statute on other grounds as recognized in *People v. Jennings* (1991) 53 Cal.3d 334, 387, fn. 13.)

Although Evidence Code section 1101 authorizes the admission of relevant evidence of prior misconduct, the admissibility of such evidence must also be reviewed under Evidence Code section 352. (*People v. Ewoldt, supra*, 7 Cal.4th at p. 404.) Evidence Code section 352 provides: “The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.” “ ‘The “prejudice” referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against defendant as an individual and which has very little effect on the issues. Under this section, “prejudicial” is not synonymous with “damaging.” ’ [Citation.]” (*People v. Bolin* (1998) 18 Cal.4th 297, 320.) Evidence is more prejudicial than probative if “ ‘it poses an intolerable “risk to the fairness of the proceedings or the reliability of the outcome.” [Citation.]’ [Citation.]” (*People v. Jablonski* (2006) 37 Cal.4th 774, 805.) “Relevant factors in determining prejudice include whether the prior acts of domestic violence were more inflammatory than the charged conduct, the possibility the jury might confuse the prior acts with the charged acts, how recent were the prior acts, and whether the defendant had already been convicted and punished for the prior offense(s). [Citations.]” (*People v. Rucker* (2005) 126 Cal.App.4th 1107, 1119.)

Admitting or excluding evidence is where a range of options is available to the trial it, as here, is reviewable for abuse. The choice of one of those options will not be

disturbed except on a showing the trial court exercised its discretion in an arbitrary or capricious manner. Abuse of discretion results when there is “a manifest miscarriage of justice. (See *People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10; *People v. Ledesma* (2006) 39 Cal.4th 641, 705; *People v. Davis* (2009) 46 Cal.4th 539, 602.)

Just as the 1977 and the 1984 incidents involved defendant’s pursuit of an unnatural or abnormal and sexual interest in minor girls, so too the charged conduct against D. involved a minor girl. Moreover, in both the 1977 and the current incidents, defendant came to school campuses, where he entered private areas reserved for young girls’ to perform highly personal activities. For these reasons, the incidents had a strong tendency in reason to reveal defendant’s motive for going to the high school, watching swimming practice, invading the privacy of a girls’ locker room, and watching D. take a shower. (See Evid. Code § 210 [defining relevant evidence].) Thus, the trial court reasonably could, and did, find the evidence to be relevant. The evidence was equally relevant to rebut defendant’s innocent explanation for his conduct. Accordingly, the trial court properly found the evidence admissible under Evidence Code section 1101, subdivision (b).

Defendant argues that the prior incidents were only minimally relevant because (1) the prior incidents were 18 and 11 years old; (2) the incidents involved girls who were much younger than D. and (3), unlike his prior acts, his current conduct was not aggressive and did not involve touching. He further argues that any probative value was substantially outweighed by potential confusion and prejudice from the inflammatory nature of his prior misconduct.

The remoteness of the prior misconduct does not necessarily weaken its probative value. There was a seven-year gap between the 1977 and 1984 incidents. The trial court reasonably could infer that since defendant’s abnormal sexual interest in underage girls persisted unabated and undiminished for seven years between his first and second acts,

the probative value of that prior misconduct was not diminished simply because his current acts occurred 11 years later.

Concerning differences in the victims' ages and defendant's conduct, we point out that "[t]he least degree of similarity (between the uncharged act and the charged offense) is required in order to prove intent." (*People v. Ewoldt, supra*, 7 Cal.4th at p. 402.)

The age difference between D. and the victims of prior misconduct does not necessarily lessen probative value. Defendant's first victim was only five years old. However, his next victim was 10 years old, indicating that his abnormal interest in young girls was not confined to kindergartners. Given the substantial differences between five-year-old kindergartners and 10-year-old fifth graders, the trial court reasonably could conclude that defendant's prior misconduct did not lose probative value simply because D. was 14 years old and in high school. Like defendant's other victims, she was still a minor and not necessarily any more different from a 10-year-old than a 10-year-old is from a five-year-old.

A similar analysis applies to differences between defendant's conduct toward his prior victims and D. In 1977, defendant followed a little girl into the girls' bathroom, where he was found with his pants and underwear down to his ankles. However, in 1984, he assaulted the victim on the street, threw her into some bushes, fondled her, and then attempted to kidnap her. Under the circumstances, the court reasonably could find that because defendant manifested his interest in young girls in substantially different ways on two prior occasions, his prior misconduct remained highly probative concerning whether his current, different conduct was motivated by the same underlying interest.

This is especially so because the different conduct toward defendant's prior victims was similar in that in each incident, defendant invaded the victim's privacy. Defendant's conduct toward D. similarly was highly intrusive and invaded her personal privacy. Moreover, as noted, this conduct took place in a girls' locker room, an area similar to where his misconduct took place in 1977.

In short, the trial court reasonably could find that, despite the remoteness of the prior incidents, the ages of the victims, and differences in defendant's acts, the prior misconduct remained highly probative concerning whether defendant's observation of D. in the shower was motivated by and, therefore just another manifestation of, his abnormal interest in young girls.

Concerning prejudice, defendant concedes that the evidence did not require an undue amount of time to present. The evidence itself was brief and not difficult to understand. However, as defendant points out, jurors could have wondered whether he had ever been punished for his prior misconduct. Moreover, although the evidence was not graphic or detailed, the prior incidents were more inflammatory than defendant's current conduct.

In this case, defendant admitted the conduct underlying the charges but offered an innocent explanation. Thus, the crucial disputed issue was defendant's mental state—i.e., was his conduct motivated by an abnormal sexual interest in young girls. As noted, the prior misconduct was highly probative on that issue. Moreover, although that misconduct was more inflammatory than the charged misconduct, the court reasonably could find that the evidence would not pose an intolerable risk to the fairness of the trial because it intended to give, and did give, a detailed limiting instruction concerning how the evidence could be used—i.e., that it was not evidence of bad character but could be considered only to show motive and for no other purpose. (See CALJIC No. 2.50.) Ordinarily, and in the absence of evidence to the contrary, we presume that juries can and do follow this type of limiting instruction. (*People v. Lindberg* (2008) 45 Cal.4th 1, 26; *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 107.)

Here, the record does not suggest that jurors were so inflamed by defendant's prior misconduct and so concerned that he may have escaped punishment for it that they might have disregarded the court's instruction and convicted him despite reasonable doubt concerning whether he acted with requisite motivation. On the contrary, that the jury

found defendant not guilty of a second count of annoying or molesting and instead convicted him of the lesser offense of loitering indicates that the jurors were not so inflamed and were instead able to maintain a proper consideration of the evidence and focus on the current charges.

In sum, therefore, defendant has not convinced us that in admitting some but not all of the evidence of defendant's prior sexual misconduct, the trial court acted in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.

V. DISPOSITION

The judgment is affirmed.

RUSHING, P.J.

WE CONCUR:

PREMO, J.

ELIA, J.